United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1317

To be argued by
T. BARRY KINGHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1317

UNITED STATES OF AMERICA,
Appellee,

—v.—

GENE LOY CHU,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Gene Loy Chu appeals from a judgment of conviction entered on July 1, 1976, in the United States District Court for the Southern District of New York, after a nine-day trial before the Honorable William C. Conner, United States District Judge, and a jury.

Indictment 76 Cr. 439, filed April 29, 1976,* charged Gene Loy Chu, Jean Fong, and Kuo Ping Yu, a/k/a "Jimmy Yu" in Count One with conspiring to defraud the United States and to violate Title 18, United States Code, Sections 1001 and 1546, all in violation of Title 18, United States Code, Section 371. Chu was also charged in Counts Two through Seven with having knowingly filed

* This indictment superseded Indictment 75 Cr. 1263, filed December 30, 1975.

false documents with the United States Immigration and Naturalization Service (INS), in violation of Title 18, United States Code, Section 1001. In Counts Eight through Fourteen, Chu was charged with endeavoring to obstruct INS proceedings by counselling his clients to lie at INS interviews, in violation of Title 18, United States Code, Section 1505.

Trial began on May 4, 1976. Counts Two, Seven, Thirteen and Fourteen were dismissed at the conclusion of the Government's case. The trial ended on May 17, 1976, with the conviction of all three defendants on all remaining counts in which they were then charged.

On July 1, 1976, Chu was sentenced to concurrent six-month suspended terms of imprisonment on each count, and he was placed on probation for two years and required to pay committed fines within thirty days of $10,000 on Count One; $2,000 on each of Counts Three through Six; and $1,000 on each of Counts Eight through Twelve, for a total of $23,000 in fines.*

Kuo Ping Yu was sentenced to two years' probation. On July 8, 1976, Jean Fong was sentenced to three years' probation. Neither Yu nor Fong has appealed.**

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* Judge Conner also imposed as a special condition of probation that Chu could not represent or counsel any persons in any matter pending before the INS during the period of probation.

** Jean Fong did not file a notice of appeal. Jimmy Yu filed a notice of appeal on July 9, *pro se*, at the behest of Gene Loy Chu (Yu Affidavit, September 16, 1976). On September 16, 1976 Yu withdrew his appeal.

Statement of Facts

The Government's Case

The Government established that during 1973 and 1974 Gene Loy Chu, an attorney, with the help of his co-defendants Jean Fong and Jimmy Yu, arranged marriages between Chinese men and American citizen women for the sole purpose of obtaining permanent residence in the United States for the Chinese aliens. In furtherance of this scheme Fong, Yu and others would obtain "clients" whom Chu represented before the INS. Chu then prepared and filed false documents with the INS and coached his clients to lie to INS interviewers in order to convince the INS that the couples were living together and had not married solely for the purpose of obtaining residence for the alien spouse.

A. The I-130 Program.

Under pertinent Immigration statutes and regulations, citizens who are married to non-resident aliens may petition the INS to classify their spouses as eligible to obtain non-immigrant visas, which ultimately lead to applications for permanent residence in the United States. The citizen must first file with the INS a sworn and notarized Form I-130, "Petition to Classify Alien Relative for Issuance of Non-Immigrant Visa," which contains information concerning the pedigree of both spouses and the addresses at which they have resided or intend to reside together. (A. 65-74).*

In 1973, INS began to conduct interviews to question spouses about the information on the form. The inter-

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* "A." refers to the appendix to Chu's brief, which contains the trial transcript and selected exhibits.

views were designed to determine whether the spouses were actually living together as man and wife, and ultimately whether the marriages were *bona fide*, *i.e.*, not entered into solely to obtain immigration benefits for the alien. (A. 75, 84). The spouses were questioned separately, under oath, about such things as the circumstances of their meeting and marriage, and the details of their lives together. (A. 75, 79-81). When discrepancies developed between the spouses' stories, the petitions were either denied outright or referred to the Frauds Unit for further investigation. (A. 80-82). During the I-130 interviews the spouses were permitted the assistance of counsel. (A. 80).**

B. Chu's scheme

Gene Loy Chu conducted his legal practice from an office at 9 Division Street in Manhattan. There during 1973 and 1974 he interviewed Chinese aliens referred by Jimmy Yu and other trusted associates. He advised the aliens that he could help them to obtain permanent residence in the United States by arranging marriages to United States citizens. (A. 96, 390, 758-60). Chu explained that his fee would be $1,000. The client would also have to deliver to Chu $1,500 in cash prior to the wedding, which sum Chu would give to the citizen-brides after the wedding ceremony. The alien would also be required to pay the girl an additional $2,000 in installments after the wedding. (A. 97, 390, 760). In one case Chu told Jout Jan Jong, a visitor from Hong Kong, in

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** Chu claimed at trial that he was not permitted to speak with his clients at the INS offices between their individual interviews (A. 1099). This statement is uncorroborated, however, and is not supported by the testimony of the INS official to which Chu refers this Court in his brief. (Br. at 5).

Jimmy Yu's presence, that Jout could get divorced as soon as he received his permanent residence and that to insure this procedure, Jout's bride, whom Chu would procure, would have to sign divorce papers at the time of the wedding. (A. 391).

Some of the girls who entered into the marriages in this case were recruited for that purpose by Chu's co-defendant Jean Fong. She explained to them that if they were willing to marry Chinese men to help them obtain permanent residence, the girls would receive $1,500 at the time of the wedding, plus $2,000 in installments later. She brought the women to Gene Chu, escorted the couples to get blood tests and marriage licenses, and was a witness at several of the weddings at City Hall. (A. 189, 191, 257, 266, 460-69).

Jimmy Yu, Chu's other co-defendant, referred aliens to Chu in order to help them obtain permanent residence. One of them was Jout Jan Jong, a boyhood friend of Yu's from Hong Kong. Another was Perry Chang, whose marriage to Elizabeth Hernandez was arranged entirely by Yu and Carmen Miranda, the woman who had been married to Jout Jan Jong as part of the conspiracy. (A. 387-403, 584-99).

Typically, a couple would be married at City Hall within a few days after being introduced in Chu's office. After the ceremony, Chu had them return to his office, where Chu gave the wife the promised $1,500 he had received earlier from the husband. At that time Chu told the woman to sign a blank I-130 petition.* (*e.g.* A. 470-77).

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*When Jean Fong was involved she received $200 from the woman for her services. (A. 193, 274, 473).

Within a few days Chu forwarded the completed I-130 forms, with supporting documents, to the INS. The petitions contained addresses for the spouses which indicated that they intended to reside together, when the evidence showed that Chu knew all along that they did not so intend. In addition, in order to make it appear as if the couples had not been to Chu's office on the day of the wedding, he falsely notarized the forms to show their execution several days after the wedding, in all but one of the five marriages at issue here. (A. 195, GX 16B; A. 272-74, GX 9B: A. 476, GX 24B; A. 710, GX 41B).

Several months after the filing of the petitions, the spouses were notified to come to the INS for interviews. Chu first called the couple to his office for questioning to insure that their stories were consistent. He would usually tell the couple that they had not studied enough about the apartment at which he knew they did not reside together, and that their stories were not properly memorized. He then obtained postponements and coached the couples further before the actual interviews. (A. 118-23, 196-201, 284-88, 402-12, 522-26, 598-607, 712-21, 768-80).

Among the stories which Chu insisted the couples tell was a lie about how they had met. All but one of the couples who were interviewed had been introduced in Chu's office, yet he instructed them to concoct a story about having met elsewhere. (A. 272, 411, 523, 722, 775). In addition, Chu told the women to say that they had married because they loved their husbands and not because they had been paid. He also told the couples to make it look as if they were in love and actually resided together. (A. 199-201, 285-88, 523, 589).

Four of the five couples whose marriages were involved in this case were interviewed, and all told lies to

the INS interviewers concerning their relationship and supposed life together. (A. 122, 202, 289, 413, 527-28, 722, 781). The fifth couple, Elizabeth Hernandez and Perry Chang, were not interviewed because Miss Hernandez refused to do so, despite the entreaties of Chu and Jimmy Yu. (A. 606-610).

C. The Scheme Collapses

Finally, in June, 1975, Chu's scheme caught up with him. One of his former "clients", Alice Aviles, threatened to expose Chu to the INS if he did not pay her and the other girls $15,000. Chu apparently did not pay the money, and within a few weeks the women gave statements to INS investigators. (A. 556-559). Coincidentally, at about the same time, Jout Jan Jong first approached INS with *his* story on the advice of his lawyer from North Carolina. (A. 427-28). Thereafter INS investigators obtained statements from the other couples and Chu's fraud came to an end.

The Defense Case.

Chu offered the testimony of three character witnesses and testified in his own behalf. He admitted having arranged the marriages (*e.g.*, A. 956) and having delivered $1,500 in his office to the young women who had married the Chinese aliens within a few days after their meeting. (A. 935). Chu denied that he had pre-arranged any divorces (A. 956, 984) and insisted that he had received fees of only $375 to $750. (A. 934-35, 939-44). Although he claimed to have noted these amounts on file folders in his office, Chu did not produce the records in court. (A. 942-44). Chu also claimed that he believed the purpose of the marriages was not only to obtain residence status for the Chinese aliens, but also to serve other purposes: companionship, apartments for the women, a father for a child, *etc.* (A. 922-23).

Chu testified that he had dated his notarizations of the I-130 forms untruthfully to reflect the date on which he had typed them (A. 866) and that he had not intended to conceal the fact that the couples were in his office on the date of the wedding. (A. 949). He also stated that his pre-INS interview advice to clients was limited to insuring that the Chinese men could understand English well enough to respond to the questions, and to advising the couple generally about what questions to expect. (A. 858). Chu denied having counseled his clients to lie and claimed that the first knowledge he had of any lies was when he heard the couples tell INS interviewers that they had met at places other than Chu's office. (A. 859, 861). In one case, Chu admittedly knew that his clients had lied, yet he accompanied them to a subsequent interview at which more false statements were made. (A. 1019-1031).

The jury convicted Chu within forty minutes of having his entire testimony re-read. (A. 1429).

ARGUMENT

POINT I

The defendant was not prejudiced by a mid-trial television broadcast dealing with the subject of fraudulent alien-citizen marriages. In any event, any claim of prejudice was waived when the defense declined to move for the exclusion of the only juror directly exposed to the broadcast.

Chu seeks a new trial because the jury was "polluted" by a mid-trial news broadcast and because the District Court failed to conduct an individual *voir dire* of each juror to determine the effect of one juror's exposure to the broadcast. This claim is meritless. It became abun-

dantly clear after the individual questioning of two jurors —the juror exposed to the broadcast and another—that no prejudice had occurred. Moreover, since the defendant specifically requested the retention of the juror exposed to the broadcast, he cannot now claim that his right to a fair trial was prejudiced in any way.

A. The broadcast.

The trial in this case began on May 4, 1976, a Tuesday, and ended on May 17, 1976, a Monday. On Saturday, May 8th, during a weekend recess in the midst of the Government's case, the CBS Television Network aired a program entitled, "CBS Evening News with Dan Rather." One of the segments of the program was a report of a few minutes' duration by a CBS correspondent from Miami. The correspondent described the fashion in which aliens acquired permanent residence in the United States by arranging marriages for money and subsequently divorcing their citizen-spouses. An attorney, an alien, and a "fraud expert" from the Immigration and Naturalization Service appeared briefly to describe the nature of the fraudulent practices engaged in by the aliens and citizen-spouses. "Marriage brokers" were discussed, as was the five-year prison penalty facing anyone caught defrauding the Government in this manner. A partial transcript of the newscast was provided to Judge Conner and is included in the appendix to Chu's brief. (A. 1445).

B. The District Court's ruling.

Prior to the taking of testimony on Monday, May 10, 1976, counsel for both sides called the broadcast to Judge Conner's attention. (A. 484). The judge first asked the jury as a whole whether anyone had seen the program. (A. 486). Only Raymond Agoney, Juror No. 6, replied in the affirmative. (A. 487).

Mr. Agoney was then questioned in the robing room by Judge Conner in the presence of all counsel. Mr. Agoney disclosed that he had seen the news broadcast, but stated that it would have no impact on his decision in the case on trial: ". . . [T]he only evidence that I will presume [sic] is the evidence that's brought into this court and only that evidence." (A. 488). When questioned further, Mr. Agoney revealed that upon arriving in the jury room that morning he had asked the other jurors "if they have seen the television show pertaining to that Miami, Florida, situation," but that he had not told them anything about the broadcast. (A. 489).

Following the Court's questioning of Mr. Agoney, Chu's counsel requested that all of the jurors be questioned individually. The Court then summoned Juror No. 8, Mrs. Lynch, who had stated in the courtroom that Mr. Agoney had told the jurors about the program. (A. 490).* When questioned in the robing room, Mrs. Lynch replied that Mr. Agoney had not told the other jurors about the contents of the program, but had merely said that the broadcast had been the "same case" or the same subject matter as this case, but in Florida. Mrs. Lynch also stated that Mr. Agoney's comment would have no effect on her ability to decide the case fairly. (A. 491-93).

After the interrogation of Mrs. Lynch, the Government, out of an abundance of caution, moved to exclude Mr. Agoney for cause because of concern that he might have been influenced by the broadcast. (A. 495). Defense counsel then conferred and reported that they were unable to agree on whether to excuse Mr. Agoney. (A. 496). After a final conference, Chu's counsel announced that

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* Mrs. Lynch's remark in open court does not appear in the record. However, all counsel noted that she had responded to the Court's initial question by referring to Mr. Agoney. (A. 499).

he was speaking for all counsel in moving for a mistrial because the jury had been "polluted." (A. 502). He claimed that a challenge to Mr. Agoney alone would cause the other jurors to speculate concerning the reason for his dismissal and would heighten their speculation that what he had seen or heard was adverse to the defendants. Accordingly, the defense specifically opposed Mr. Agoney's discharge. (A. 502). Under those circumstances, the Government agreed to retain Mr. Agoney on the jury. (A. 503).

When the trial resumed in open court, Judge Conner asked the following questions, with attendant cautionary instructions:

> "I apologize for the delay. Before we start I want to ask one last question of the jury as a group. This is directed to everyone, except Mr. Agoney.
>
> Is there any of you who from the comment or question that was asked or made by Mr. Agoney this morning got any impression about the content of that program, that is, whether or not there was any opinion expressed by the commentator about the general subject of marriages between aliens and United States citizens?
>
> Is there any of you that feels because of the fact that there was such a program or the fact that one of your jurors saw it and made a brief comment about it that you will be in any way affected in reaching a fair and impartial verdict on the facts of this case?
>
> I want to instruct you that this case is going to be tried on the evidence presented here, and I want you to put completely out of your mind the fact that there was a program on TV Saturday night which relates to the same general subject matter. Your decision should be based only on the evidence

here and the instructions that I will give you at the conclusion of the trial as to the applicable law.

If anyone tries to tell you about that program Saturday night cut them off immediately, and if they persist and tell you anything about the program, then I ask that you report the matter to us here in court so that counsel will be fully aware of what happened, and they can take whatever steps they feel necessary under the circumstances. I don't want you to get any extra judicial input, that is, any information or facts or opinions about the subject matter of this case outside of this courtroom." (A. 505-6).

C. The District Court was not required to question each of the jurors individually.

Chu claims on appeal, as he did at trial, that he is entitled to a new trial because Judge Conner refused to conduct a mid-trial *voir dire* of each of the jurors individually to determine the effect on them of Mr. Agoney's statement about the television show he had seen.

Initially, it is important to note that Mr. Agoney was the only juror who had actually seen the program. Secondly, both he and Mrs. Lynch indicated that he had not divulged the contents of the broadcast, save, at the most, to say that it was the same case or subject matter as this case, but that it had emanated from Florida. Under those circumstances, Judge Conner's conduct cannot fairly be criticized.

Judge Conner questioned Mr. Agoney individually, and was prepared to excuse him if the defendants wished. (A. 493). Indeed, the Government had so moved. The Court's individual questioning of Mrs. Lynch, the defend-

ants' choice for interrogation (A. 490), merely served to reinforce the conclusion that nothing Mr. Agoney had said had "polluted" the jury. Finally, the Court's general questions to the jury, which received negative responses, with the appropriate cautionary instructions, more than adequately insured that none of the jurors had in any way been affected by Mr. Agoney's statements.

Chu incorrectly argues that the mid-trial news broadcast *required* individual questioning of the jurors, based upon Section 3.4(a) the American Bar Association's Standards Relating to Fair Trial and Free Press (1968). The ABA Standard "requires" examination of individual jurors only when "there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material." * Here there was no "significant possibility" that anyone other than Mr. Agoney would be ineligible to serve, since it was properly determined that none of the other jurors had been informed of the substance of the program. Thus, even if the ABA Standards are applied, Judge Conner acted properly under the circumstances. While Chu would extend the suggested standard to a "requirement" of individual *voir dire* in the instant case, he fails to recognize that such a step is within the broad discretion of the trial court—a discretion which was exercised properly here.

Similarly, Chu's reliance on *United States* v. *Colabella*, 448 F.2d 1299 (2d Cir. 1971), *cert. denied*, 405 U.S. 929 (1972), is entirely misplaced. In *Colabella* during a general *voir dire* of the jurors before the testimony began, several jurors were excused on their claims of "prejudgment." During the robing-room examination of one juror,

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* The standard cited by the defendant applies specifically to *pretrial* publicity. However, the same standard is suggested for *voir dire* resulting from mid-trial publicity. ABA Standards Relating to Fair Trial and Free Press § 3.5(f).

the juror expressed the opinion that certain remarks of the trial judge indicated that he had prejudged the case and that other jurors felt likewise. 448 F.2d at 1302. The defendant argued on appeal that the judge's comments to those who were excused from the array had prejudiced the remaining jurors. Noting the terms of the ABA Standard, this Court affirmed the conviction and suggested that it would be advisable for judges "soon after there is an indication that a juror will claim he was biased (or that the judge is prejudiced), to proceed thereafter *in camera*, with counsel and the defendant present." *Id.* at 1304. Then, in a footnote, Judge Kaufman suggested the very practice followed by Judge Conner in this case:

> "For example, if the judge directs a blanket question on prejudice to the venire (as several judges in the Southern District do), and a juror raises his hand indicating a response, we suggest that the judge should consider the wisdom of continuing his examination in the robing room." *Id.* at 1304 n.6.

Moreover, the mid-trial *voir dire* in this case was similar to the pretrial questioning in *United States* v. *Liddy*, 509 F.2d 428 (D.C. Cir. 1974), also cited by Chu. In *Liddy*, a case which involved extensive pretrial publicity, the District of Columbia Circuit noted that the trial judge had

> ". . . complied with the ABA recommendation by examining individually all prospective jurors who indicated an opinion regarding guilt or innocence or who recalled details of the case, for only those veniremen, under the facts of this case, presented a significant possibility of ineligibility." 509 F.2d at 437.

Here, Judge Conner properly isolated the one affected juror by individual questioning.* His later general questions to the jury as a whole were well within the spirit of the ABA Standard and were a proper exercise of his broad discretion. See *United States* v. *Tropiano*, 418 F.2d 1069, 1079 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

Futhermore, Chu cannot now complain that the jury was "polluted" when he specifically requested the retention of Mr. Agoney, the only juror who had seen the broadcast and the only juror whose judgment could possibly have been affected.

The defense was not forced to retain Mr. Agoney, as Chu seems to argue. (Brief at 10). There is nothing in this record or in any authority cited by the defendant to support the speculation that Mr. Agoney's dismissal would have reflected adversely on the defendants. This is particularly so, since a dismissal of Mr. Agoney could have been accompanied with an instruction that Mr. Agoney was being removed at the request of *both* the Government and the defense and that the jurors should not speculate about the contents of the broadcast.** The defendant should not, we submit, be permitted first to retain Mr. Agoney and then argue that he might have "polluted" the jury. The defendant must bear the con-

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* Even in *Remmer* v. *United States*, 350 U.S. 377, 381-2 (1956), in which a juror had been improperly "approached" during the trial, the Supreme Court focused on the prejudicial effect on the juror in question, not on the two other jurors to whom he had mentioned that he had been approached.

** Indeed, since only Mr. Agoney knew the substance of the program, his dismissal without a cautionary instruction might have caused speculation by the others that he had seen a program which criticized the Government for unfairly harassing aliens who sought permanent residence in the United States.

sequences of his informed choice and cannot "invite error." See *United States* v. *Valdivia*, 492 F.2d 199, 204 (9th Cir.), *cert. denied*, 414 U.S. 801 (1973); *United States* v. *Bramson*, 139 F.2d 598, 600 (2d Cir.), *cert. denied*, 321 U.S. 783 (1943); *cf.*, *United States* v. *Pineros*, Dkt. No. 75-1354, slip op. at 2861 (2d Cir., Mar. 29, 1976).

POINT II

The District Court properly refused to conduct an evidentiary hearing on the issue of the Government's alleged involvement in the mid-trial television broadcast.

Chu asserts that he is entitled to a new trial if the Government knew or had reason to know that the CBS newscast would be televised in New York during the trial. More specifically, he claims that the District Court should have conducted an evidentiary hearing to determine the extent of the Government's participation in the preparation and showing of the broadcast. Judge Conner correctly denied the motion during the trial, because the motion was supported by a totally inadequate factual showing and because the defendants had suffered no prejudice, as discussed in Point I, *supra*. (A. 504).*

First, Chu's motion for an evidentiary hearing was properly denied because it was not supported by any showing of facts which, if proved, would have entitled him to any relief. See, *e.g.*, *United States* v. *Culotta*, 413 F.2d 1343 (2d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970); *Cohen* v. *United States*, 378 F.2d 741, 760 (9th Cir. 1967). Chu had six weeks from the date of the

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* Following the trial, on June 24, 1976, Chu's counsel moved for a new trial and again requested a hearing on this point. The motions were denied at the time of sentencing.

verdict until the time of sentence within which to obtain the facts—if any existed—to support his allegations.* His failure to do so leaves this Court with the same few uncontested facts confronting Judge Conner, and the same result should therefore obtain: rejection of Chu's claim.

But even assuming *arguendo* that Chu's allegations were sufficient to merit a hearing, Judge Conner's denial of the motion was correct, since Chu suffered no prejudice as a result of the broadcast.** *See* Point I, *supra*. The mere existence of publicity, even if Government-generated and specifically about the case on trial, will not mandate dismissal of an indictment or a new trial. The ultimate test is whether the jury has been affected and whether the defendant will receive a fair trial before an impartial jury. See *United States* v. *Kahaner*, 204 F. Supp. 921, 924 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963). Thus, in *United States* v. *Bando*, 244 F.2d 833 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957), this Court recognized that although prejudicial publicity emanating from law enforcement officials is to be condemned, it does not make a fair trial improbable. Rather,

> "The degree of care exercised by the trial judge in his examination of the panel of jurors on the *voir dire*, to determine whether the publicity has so impressed them that they will not be able to give the defendant a fair trial, is an important consideration." *Id.*, 244 F.2d at 838.

Here, as we have shown, a mid-trial *voir dire* was properly conducted and the defendants waived any pos-

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* Chu's trial defense team included three attorneys and two private investigators.

** Government counsel represented to the Court that neither the United States Attorney's Office nor the Regional Office of the Immigration and Naturalization Service had any prior knowledge of the broadcast. (A. 499-500).

sible prejudice by requesting the continued participation of the only juror who had been touched by the broadcast. Accordingly, in the absence of prejudice, the District Court properly rejected Chu's efforts to obtain a needless evidentiary hearing.*

POINT III

The District Court properly instructed the jury that it could determine knowledge of falsity from the defendant's reckless disregard for the truth of the statements submitted to the Immigration and Naturalization Service.

The indictment charged that Chu filed the I-130 forms on behalf of his clients, knowing that the forms contained false statements as to the spouses' addresses. On the element of knowledge of falsity required for conviction under Title 18, United States Code, Section 1001, Judge Conner first instructed the jury that the Government was required to prove knowledge beyond a reasonable doubt. (A. 347-48). Then at the Government's request, he charged:

> "If you find that the defendant Chu acted with reckless disregard of whether the statements were true or false, or consciously closed his eyes to facts which should have put him on inquiry, then the requirement of knowledge will have been satisfied

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* Chu seems to argue that whenever the Government participates in publicity about a case a new trial is required. (Brief at 13). The absurdity of this *per se* approach is apparent in the case of a sequestered jury or, indeed, in this case, where only one juror had been exposed and he was retained at the defendants' request.

> unless you find that the defendant Chu actually believed that the statements made were true.
>
> In other words, the defendant Chu may not be convicted on counts 2 through 5 if he actually believed the statements made in the I-130 petitions, no matter how recklessly he may have acted." (A. 1348).

Chu's claim that Judge Conner should not have instructed on recklessness with respect to the false statements counts because the evidence did not support such a charge is meritless.*

Judge Conner's ruling on the defense objection to the giving of this charge correctly summarizes Chu's error:

> "I am inclined to think that this is a case where reckless disregard might be an issue. If the jury believes the defendant Chu in his statement that he didn't have actual knowledge, and at the same time believes testimony of some of the witnesses that the circumstances are such that any reasonable person would have been put on notice, they could conclude from the evidence that Mr. Chu had deliberately closed his eyes to facts which should have put him on notice, and I am going to leave in the charge with respect to recklessness." (A. 1160).

In short, Chu fails to recognize the extent of the jury's province to determine facts and to accept or reject all or portions of a witness' testimony.

Indeed, it would have been a great disservice had Judge Conner refused to give a recklessness charge, since this

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* The defendant does not claim, nor could he, that the instruction as given was incorrect. See *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975). He simply argues that the instruction should not have been given at all.

was a "classic case" for such a charge. While the I-130 forms clearly contained false statements as to the present address of the alien beneficiaries and the future addresses of the couples (lines 16d and 21 on GX 9B, 16B, 24B, 33B, 41B; A. 1434-43), the Government's proof that Chu knew the forms were false was largely circumstantial. That evidence included the fact that the citizen spouses were paid money for the marriages; that they came to Chu's office immediately after the marriage for the payment of the money; that the citizen-spouses signed the I-130 forms in blank at Chu's direction; and that Chu notarized the forms as having been signed in his presence several days after the marriage, a fact which he admitted was false. (*e.g.*, A. 961).

This case was therefore virtually identical to *United States* v. *Sarantos*, 455 F.2d 877, 882 (2d Cir. 1972), where this Court found that the fact pattern made that case a "classic" one for a recklessness instruction:

> "The parties to the sham marriages visited [attorney Sarantos'] office shortly after the wedding ceremony. There the wife would sign a visa petition in blank, which Sarantos would later complete and file with the INS. In each case the petition stated falsely that the parties were living together as husband and wife. Sarantos also instructed wives who were called before the INS to say that they were living with their husbands but not to mention that they were paid to marry. Although the Government failed to show that Sarantos was ever explicitly told that the couples were not living together, it did furnish abundant evidence that Sarantos was informed of the sham nature of the marriages: In some cases newlyweds required in his presence the aid of an interpreter or sign language because they shared no

> common language; divorce papers were executed simultaneously with immigration papers; Sarantos was told the wife was being paid a fee; and Sarantos was at least indirectly informed that the parties were not living together." *Id.* at 879-80.

While it is true that the Government argued that Chu not only had actual knowledge of the sham nature of the marriages but also had designed the fraudulent scheme from the outset, that argument to the jury was not inconsistent with a recklessness instruction. For, as Government counsel pointed out to Judge Conner, the jury was as free to accept or reject the Government's theory and parts of the testimony of the Government's witnesses as it was to accept or reject all or a part of the defendant's testimony as to knowledge. Thus, the jury could have believed that although Chu was not specifically told of the falsity of the addresses on the I-130 forms, the circumstances surrounding their execution were so suspicious that under the circumstances he must have been aware of their falsity. Indeed, the jury could have so found from his testimony alone and could have determined that he had not actually believed the statements as to address to be true, as he claimed.

Judge Conner's instruction properly left the jury the latitude to which it was entitled in deciding the crucial factual issue of knowledge of falsity.

POINT IV

The evidence is more than sufficient to sustain Chu's conviction for conspiracy.

Through tortured reasoning, Chu argues that he was entitled to an acquittal on Count One because the evidence was insufficient to establish participation in the conspiracy by his alleged co-conspirators. First, he argues that no conspiracy was proved among Chu and his co-defendants Fong and Yu, since there was inadequate proof that Fong and Yu knew that the marriages arranged in this case were part of an attempt to defraud the United States. Secondly, he claims that there was insufficient evidence to establish the single conspiracy charged in the indictment, because the aliens and citizen-spouse co-conspirators were not proved to have been part of the single conspiracy.

Finally, Chu argues that his conviction on Count One must be reversed in any event because it is not possible to determine which object of the conspiracy the jury found him guilty of committing. The premises of Chu's claims are erroneous and his arguments are without any merit.

The indictment charged that the defendants Chu, Fong, Yu and others had conspired to defraud the United States and to violate 18 U.S.C. §§ 1001 and 1546, with respect to filing false documents. As noted earlier, the evidence (the general sufficiency of which Chu does not challenge in this appeal) established that Chu knowingly filed false I-130 petitions on behalf of his clients, and that he helped his clients to defraud the INS, with those statements and with the lies they told at the I-130 interviews. The ultimate object of the conspiracy was to convince the INS that the couples were married and living together, so that the aliens could obtain non-immigrant

visas and ultimately seek permanent residence in the United States.

The evidence, considered in the light most favorable to the Government, also established that both co-defendants Jean Fong and Jimmy Yu, who have not appealed, knew that the object of their agreement with Chu was to convince the INS that the couples were living together as man and wife.

The evidence of Jimmy Yu's knowledge was abundant. Jimmy Yu brought his boyhood friend, Jout Jan Jong, to Chu's office, and was present when Chu explained to Jout what steps would be taken to obtain his permanent residence. In addition to assuring Jout that he could obtain a divorce as soon as he received his "green card", Chu explained in Yu's presence the payments which Jout would have to make to his spouse, and told Jout that he, Chu, would obtain the girl for him to marry. Later, after Jout's wedding to Carmen Miranda, Yu knew that the two did not reside together as man and wife because Jout lived at Yu's house in Queens or in North Carolina. Indeed, Jout made his monthly cash payments to Miranda through Jimmy Yu, because Chu had instructed Jout not to pay Miranda directly. (A. 386-91, 397-404).

During Yu's meetings with Carmen Miranda for the purpose of paying her on Jout's behalf, Yu asked her if she could obtain any other girls to marry Chinese aliens. When she produced Elizabeth Hernandez, Yu arranged Hernandez' marriage to Perry Chang, a waiter at the restaurant where Yu was employed. (A. 514-16). Yu explained to Hernandez that Perry had to get married in order to get his citizenship and that his case was coming up soon. He told her that she should trust both him and the lawyer who was working with them. Thereafter, Hernandez went to see the defendant Chu at his office, and Chu explained that she would have to convince the

INS that she and Perry were really married. (A. 587-93). Later, when Hernandez refused to go through with the interview, Yu, in Chu's office, tried to convince her to do so. (A. 607-8).

In addition, it was Yu who, at the time of the wedding, asked Hernandez to sign papers in blank. Because Hernandez did not recall having signed the I-130 petition at Chu's office, and because it is notarized on the date of her wedding, when she was not at his office, the jury could properly infer that one of the forms which Yu had her sign was a blank I-130. (A. 593-4). In any event, the jury was more than justified in concluding that Jimmy Yu was a knowing co-conspirator with Chu.

The evidence of co-defendant Jean Fong's knowing involvement in the conspiracy is also convincing. Jean Fong had referred Frances Torres, Mildred Miranda and Carmen Miranda to the defendant Chu so that the women could earn money for marrying citizens. Jean Fong arranged the details of those marriages, and she received approximately $200 per marriage for her efforts. She was present in Chu's office when he explained the payment schedule to both spouses, as she had done before to the women separately in identical terms. (A. 188-95, 256-72, 459-74). In addition, Jean Fong herself was married to a Chinese alien and undoubtedly knew that representations had to be made to the INS concerning the parties' marital relationship and life together. (A. 1087). She clearly knew that the sole purpose of the marriages was to obtain permanent residence for the aliens, and, indeed, she was present when the blank I-130 forms were signed. (A. 195, 269, 474).

Thus, the direct and circumstantial evidence is more than sufficient to support the jury's conclusion that Gene Loy Chu conspired with Jimmy Yu and Jean Fong to defraud the United States as charged in Count One.

There was also ample evidence of Chu's conspiracy with the married couples. Of course, Chu argues—as he must in order to prevail in his attempt to obtain reversal of his conviction on Count One—that this evidence is proof of multiple conspiracies rather than the single conspiracy charged in the indictment. This Court need not reach this issue, however, because even if Chu's "separate conspiracy" theory is correct—which it is not—he cannot now complain about a failure of proof of one conspiracy. Chu simply suffered no prejudice by the submission of the case to the jury as a single conspiracy because the evidence is uncontroverted that Chu himself was at the hub of every possible conspiracy proved at trial. *United States* v. *Sir Kue Chin*, Dkt. No. 75-1227 (2d Cir., April 21, 1976), slip op. at 3365, n.1; see *Berger* v. *United States*, 295 U.S. 78 (1935); *Jolley* v. *United States*, 232 F.2d 83 (5th Cir. 1956).

In this regard, the defendant's reliance on *Kotteakos* v. *United States*, 328 U.S. 750 (1946); and *United States* v. *Branker*, 418 F.2d 378 (2d Cir. 1969), is totally misplaced. He loses sight of the fact that even if the spouses here were "spoke conspirators", an issue we do not concede and which this Court need not reach,* he himself was a

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* It is difficult to understand Chu's claim that the spouses here were not co-conspirators with each other, when many had common links. The evidence established, for example, that Carmen Miranda, who was initially recruited by Jean Fong to marry Fan Wun Chiu, was unable to do so because her birth certificate had not arrived from Puerto Rico. Thus, Jean Fong and Gene Chu suggested that Fan marry Carmen's sister Mildred instead. Jean Fong and Imgard Cruz, who later married Brian Yeung, were witnesses to the wedding. Later Carmen married Jout Jan Jong in a wedding arranged by Chu, Fong and Yu, and she became a recruiter both for Chu and Jimmy Yu in order to provide more girls to marry Chinese aliens. The interweaving by Carmen Miranda and others among the various levels of the conspiracy is strong evidence against the existence of the multiple conspiracies which Chu claims were proved.

co-conspirator in every conspiracy which the jury might find. *Branker* has nothing to do with this point, and *Kotteakos* involved claims of prejudice by unconnected "spokes", not by the admitted "hub" as in this case.

In his final futile argument on this issue, Chu claims that a factual deficiency as to either alleged object of the conspiracy requires a reversal on Count One because there is nothing to indicate which object the jury found to be proved. (Brief at 21). Even assuming Chu's premise to be correct, *i.e.*, that only one object of the conspiracy was proved, his argument fails. This Court has held in a long line of cases, most recently in *United States* v. *Dixon*, 536 F.2d 1388, 1401-02 (2d Cir. 1976), that where multiple objects of a conspiracy are alleged in the indictment, proof of any one object will be sufficient to sustain the conviction. See *United States* v. *Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States* v. *Mack*, 112 F.2d 290 (2d Cir. 1940). Here, the proof of a conspiracy to defraud the United States was overwhelming. Chu's conviction on Count One survives any conceivable failure of proof as to other objects of the conspiracy.

POINT V

The District Court properly refused to instruct the jury with respect to Chu's claim that his silence dur ng or after I-130 interviews was a result of his attorney-client relationship.

Without citation to any legal precedent, Chu argues that he was entitled to an instruction based on at least one of the two requests to charge which he submitted on the nature of the attorney-client relationship as it related to the conspiracy and obstruction of justice counts. His requests to charge were properly denied by the District Court.

The indictment charged, and the Government proved, that during practice sessions in his office prior to the I-130 interviews, Chu had counselled his co-conspirator clients to lie to the Immigration Service about the circumstances of their meeting and their supposed marital relationship. The spouses testified that among other things, Chu instructed them not to tell the INS interviewers that they had been introduced in his office. Instead, he helped them to invent false stories about meeting elsewhere. (A. 284, 523-4, 775-6).

Chu denied having coached his clients to lie at the interviews, and claimed that he first realized lies had been perpetrated when discrepancies arose during the I-130 interview of Fan Wun Chiu and Mildred Miranda. (A. 871-72). Chu admitted, however, that in subsequent I-130 interviews he heard Frances Torres, Tommy Hu, Carmen Miranda, Jout Jan Jong, Imgard Cruz and Brian Yeung lie about the circumstances of their respective meetings. (A. 884, 892, 1018). All had met for the first time in Chu's office a few days before their marriages.

(A. 971, 1018, 1039, 1046). The two other marriages in this case were between spouses who had not met in his office: Fan Wun Chiu-Mildred Miranda and Perry Chang-Elizabeth Hernandez. The latter couple were never interviewed by the Immigration Service. As described earlier, the Fan-Miranda interview took place in Chu's presence and the couple lied about living together. (A. 872). Chu had coached them how to describe the apartment where Mildred lived with another man, all of which was known to Chu at the time of the I-130 interview. (A. 199-204). Chu claimed that he had not corrected his clients' lies because he felt that "ethically as an attorney I could not do that." (A. 884).

In this setting, Chu submitted two proposed requests to charge, entitled "Silence of Attorney." In the first he requested an instruction that the communications which Chu received from his clients were protected by the attorney-client privilege; that he was obliged not to volunteer to the INS facts which he had learned as part of his attorney-client relationship; and that therefore the jury could draw no adverse inferences from Chu's silence at the I-130 interviews.* In his alternate request, Chu

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* The entire requested instruction was:

"Mr. Chu is an attorney, licensed to practice in the Courts of New York State and before the Immigration Service. As an attorney, he is bound by his professional ethics not to disclose communications which have been received by him from his clients as part of the confidential relationship which must exist between an attorney and his client. I instruct you, as a matter of law, that the communications which Mr. Chu received were protected by the attorney-client privilege. Therefore, Mr. Chu was obliged not to volunteer or disclose to the Immigration and Naturalization Service facts which he had obtained as part of the confidential relationship. Therefore, even if you

[Footnote continued on following page]

asked that the jury be instructed that the defense contended that Chu was disabled by the privilege from revealing any confidences to the INS and that if Chu believed in good faith that the communications he had received from his clients were privileged, no adverse inference could be drawn from his failure to disclose his clients' lies to INS at the time of the interviews.*

Simply put, then, Chu sought an instruction that no adverse could be drawn from his silence at the time of the INS interviews of his clients either because he was ethically bound not to speak up at those interviews or because he honestly believed that he was so bound.

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find that the defendant Chu knew that statements made by his clients were untrue because he had information as part of the attorney-client relationship, you may draw no adverse inferences against him as a result of his silence at such interviews.

* The alternate request provided:

The defendant Chu is an attorney licensed to practice in the Courts of New York State and before the Immigration Service. As such, he has a professional obligation not to disclose communications made to him by a client as part of the confidential relationship that must exist between an attorney and his client. The defense contends that all of the communications received by Chu were received under the protection of the attorney-client relationship and that the defendant Chu could therefore not disclose to the Immigration Service facts thereby obtained. However, if the defendant Chu, in good faith, believed that the communications he received were protected by the attorney-client privilege, you may draw no adverse inferences against him for his failure to disclose to the Immigration and Naturalization Service at the time of the interviews in question that his clients may not have been telling the truth to the Immigration and Naturalization Service."

Judge Conner properly refused to give either of these confusing instructions, and correctly instructed the jury that:

> ". . . [T]he Government must prove more than that the defendant Chu did not disclose or volunteer information to that agency, or that he merely sat silent while misrepresentations were made to the agency.
>
> If the Government proves only silence on the part of the defendant Chu, it will have failed to make out a case against him on the conspiracy charge." (R. 1342-44).

First, Judge Conner correctly declined to instruct as the defense requested, because the requested charges were erroneous and incomplete as a matter of law. Chu *was obliged* by Disciplinary Rule 7-102(B)(1) of the Code of Professional Responsibility to reveal his clients' fraud to the INS if his clients refused to rectify their lies.* Thus, Chu's requested instructions were misleading in that they did not include reference to his ethical obligations to have his clients correct their lies or risk having him notify the Immigration Service. Indeed, the first request was quite plainly legally incorrect, since it ex-

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* DR 7-102(B)(1) provides:

> "(B) A lawyer who receives information clearly establishing that:
>
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refused or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication."

As noted herein there was no privilege attached to the information which caused Chu to know his clients had lied.

plicitly provided that Chu had properly complied with the privilege, and the second was grossly misleading since it strongly implied that Chu's position on the privilege was correct as a matter of law.

The instructions were also incomplete because they failed to take into account the Government's proof that all of the communications between the spouses and Chu were in the furtherance of the commission of a fraud on the United States, a situation in which the attorney-client privilege does not apply. *United States* v. *Hoffa*, 349 F.2d 20, 37 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966). The proffered instructions failed to apprise the jury that, if communications were made to Chu in furtherance of the commission of a crime of which he had knowledge, no privilege was applicable.

Moreover, the requested instructions were misleading in that they did not correspond to the facts of this case. The instructions referred to Chu's obligation not to disclose *communications* made to him by clients in connection with an established attorney-client relationship, and, indeed, only *communications* between attorney and client are privileged. See *Colton* v. *United States*, 306 F.2d 633 (2d Cir.), *cert. denied*, 371 U.S. 951 (1962). Even by Chu's own testimony, however, he knew the spouses had met in his office because *he had introduced them.* He did not therefore learn that their statements were false by virtue of an attorney-client relationship or any communication which was intended to be confidential. Indeed, each of the introductions of the three couples took place in the presence of third persons (*e.g.*, co-defendants Fong and Yu) and cannot be considered part of a confidential relationship. (A. 269, 393, 762). See *United States* v. *Blackburn*, 446 F.2d 1089, 1091 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972).

A defendant is entitled only to correct instructions. As Judge Friendly recently observed in *United States* v. *Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), "although lawyers seem never to learn the lesson, it is elementary that to put a trial court in error for declining to grant a requested charge the proffered instruction must be accurate in every respect." Such was decidedly not the case here. By instructing the jury that proof of mere silence was insufficient to convict Chu on the conspiracy count, Judge Conner provided the defendant with all to which he was entitled. The defendant argued that he felt ethically bound not to speak up to correct his clients' lies. (A. 1282). The Government did not dispute this point. (A. 1185-86), and Judge Conner's instruction on "mere silence" simply left the jury free to draw whatever inference it wished to from Chu's post-interview silence. This was entirely proper, particularly in light of Chu's obligation to have acted to ameliorate his clients' fraud—an obligation which, to Chu's advantage, was not expressed to the jury.

Finally, even if Chu's requested instructions had been complete and correct—and they were not—, Judge Conner's failure to deliver one or the other of them could not have been prejudicial in light of the overwhelming evidence of Chu's guilt. In this connection, it is significant that none of the parties at trial sought to draw adverse inferences from Chu's silence *at the interview*. (A. 1185-86-1282).* The Government's theory was that Chu and his clients had committed fraud from the initial planning and filing of the I-130 petitions; Chu argued that he first learned something was wrong at the interviews. Obviously, the jury did not believe him.

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* Compare Disciplinary Rules 7-101(A)(3) and 7-102(B), Code of Professional Responsibility.

The Government established conclusively that citizens were solicited by co-defendants Jean Fong and Jimmy Yu and others to enter into marriages for the sole purpose of obtaining permanent residence for aliens. Chu told some spouses that divorces would be arranged after the aliens had obtained residence. He explained the system of compensation and Chu delivered the initial $1500 to the citizen spouse on behalf of the alien. Chu admitted having prepared the couples for their INS interviews, although he denied coaching them to lie. He admitted that his post-dated notarial stamp on the I-130 forms was false, but denied that his intention was to show INS that the spouses had not been to his office on the day of their wedding. He also admitted that even though he knew that some of the spouses had lied at their interviews, he permitted them to undergo questioning later, and did not suggest that they withdraw their petitions. In short, the credible corroborated evidence of guilt was substantial. The jury verdict within an hour of having Chu's testimony re-read indicates his utter lack of credibility in the face of the Government's strong evidence.

Thus, any possible error in failing to give Chu's requested instruction on the attorney-client relationship was harmless beyond a reasonable doubt. As defense counsel put it, this simply was *not* a case about Chu's silence during the I-130 interviews. (A. 1282). Rather, it was a case in which Chu counseled his clients to make false statements in furtherance of their common unlawful goal: permanent residence for the aliens. See *United States* v. *Sarantos*, 455 F.2d 877, 881 (2d Cir. 1972).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

T. BARRY KINGHAM, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 28th day of September, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Peter Fleming, Jr., Esq.
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And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

T. Barry Kingham
T. BARRY KINGHAM

Sworn to before me this
28th day of September, 1976
Alma Hanson

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